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FILED
OCT 13 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

October Term, 1943.

No. 358.

COSGROVE-MEEHAN COAL CORPORATION, COSGROVE & COMPANY, INC., COSGROVE-MEEHAN COAL COMPANY OF PENNSYLVANIA, and LENOX COAL COMPANY,

*Petitioners,*

*v.*

MAURICE P. ANGLAND,

*Respondent.*

## Petitioners' Reply Brief in Support of Petition for Writ of Certiorari

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## PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The briefs of both the respondent and the Solicitor General of the United States urge that the petition for writ of certiorari filed herein should be denied for the reasons that:

(1) The order remanding the cause to the District Court for further proceedings is not a final order; and

(2) There is no conflict of decisions.

Even if their position were correct, the mere statement of these reasons makes it apparent that they have missed the ground for filing the petition, namely, that the Circuit Court of Appeals for the Third Circuit is by its mandate attempting to direct the District Court for the District of Delaware to exercise a jurisdiction which it does not now have.

In the case of *Indianapolis v. Chase National Bank*, 314 U. S. 63 (1941), Mr. Justice Frankfurter, speaking for this Court, at page 75, stated:

> "And, of course, this Court, by its denial of certiorari when the case was here the first time, could not confer the jurisdiction which Congress has denied."

In our petition we pointed to paragraph (1) of Section 224 of Chapter X of the Bankruptcy Act, as amended (11 U. S. C. A. § 624), which provides that:

> "Upon confirmation of a plan—
>
> "(1) The plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed, or are allowable; * * *"

We further pointed out that the court had adopted this language in its order confirming the plan dated June 6, 1942, and had, in further compliance with that section and with the provisions of the law, directed the debtors and the reorganized company to carry out the plan of reorganization and to make distribution in accordance with the provisions of the plan. We also directed the court's attention to the fact that no appeal had been taken from that order and that the time for such appeal had expired. Consequently, under the law and in the absence of a showing of fraud or injustice, the District Court is without jurisdiction to modify the plan at the suit of a creditor; and the

Circuit Court of Appeals is likewise without jurisdiction to command the court to take such action.

This Court, both in its decisions and rules, has recognized the necessity of confining its inferior courts within the limits of their jurisdiction. Rule 38, paragraph 5, setting forth the character of reasons for a review on writ of certiorari, provides among others, the following:

> "(b) Where a circuit court of appeals * * * has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

Mr. Chief Justice Fuller, speaking for this Court in *In re Chetwood*, 165 U. S. 443, 461 (1897), stated:

> "By section 14 of the Judiciary Act of September 24, 1789 (1 Stat. 81, c. 20), carried forward as section 716 of the Revised Statutes, this court and the Circuit and District Courts of the United States were empowered by Congress 'to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law'; and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *Amer. Construction Co. v. Jacksonville Railway,* 148 U. S. 372, 380. And although, as observed in that case, this writ has not been issued as freely by this court as by the Court of Queen's Bench in England, and prior to the act of March 3, 1891, c. 517, 26 Stat. 826, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice. Tidd's Prac. *398; Bac. Ab., Certiorari."

As stated in our main brief, petitioners should not be compelled to submit to a proceeding over which the court has no jurisdiction, with the consequent delay and expense and the undoubted necessity of a further appeal to the Circuit Court of Appeals, and perhaps to this Court, particularly when the answer to the question posed by the Circuit Court of Appeals is clear on the face of the record, namely, that the allowance of a creditor's claim at this late date would dilute the assets awarded to diligent creditors, thus materially and adversely affecting their interests and requiring a reopening of the plan and a resolicitation of acceptances thereof.

The respondent and the Solicitor General both contend that there are no decisions in conflict with the decision of the court below. This is by no means clear. Judge Frank, speaking for the Circuit Court of Appeals for the Second Circuit, in *In re Paragon Novelty Bag Co., Inc. City of New York v. Jersawit,* 135 Fed. (2d) 210 (1943), referring to Section 57, sub. n, of the Bankruptcy Act, as amended (11 U. S. C. A. § 93, sub. n), said:

> "The statement in the note in Pepper v. Litton, 308 U. S. 295, 304, 305, 60 S. Ct. 238, 244, 84 L. Ed. 281, to the effect that the bankruptcy court 'in the exercise of its equitable jurisdiction has power to permit claims to be proved' after the six months 'in order to prevent a fraud or an injustice' has no application here; that comment related to the statute before the 1938 amendment; moreover, here there was no showing that to allow the tardy filing of the claim was necessary 'in order to prevent a fraud or an injustice.' Appellant refers to the provision in § 57, sub. n, as amended, reading, 'When in any case all claims which have been duly allowed have been paid in full, claims

not filed within the time hereinabove prescribed may nevertheless be filed within such time as the court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case.' Appellant argues that this provision means that any failure to file a claim within the six-months' period must be excused if any of the assets have not yet been distributed among the creditors who filed their claims within the period. Of course, that is not true. The provision means merely that any surplus, which remains after all claims properly filed have been paid in full, shall be applied to claims tardily filed and shall not be for the benefit of the bankrupt."

Although he was there referring to a bankruptcy case, the principle is equally applicable here, that a tardy creditor can only be let in to the extent that there is a surplus available to the bankrupt or the owner of the business; and the record shows in this case that there was no surplus available to stockholders.

Likewise, in the case of *Mohonk Realty Corporation v. Wise Shoe Stores, Inc.*, 111 F. (2d) 287 (1940), the same court said:

> "A reorganization plan consummated under Chapter X is binding even as against creditors who were never scheduled and never knew of the proceedings."

Section 222 of the Bankruptcy Act, as amended (11 U. S. C. A. § 622), must necessarily be read in connection with Section 224 which follows it and must be interpreted as meaning that the court cannot exercise its discretion to reopen a plan of reorganization which has been confirmed unless there is a showing of fraud or injustice.

The respondent presents additional grounds for the denial of the petition for a writ of certiorari which petitioners believe to be immaterial and unworthy of reply. Perhaps one statement demands clarification: The time fixed for filing claims, namely, November 1, 1937, was extended by the order of the court approving the plan dated April 17, 1942 (No. 108) to May 29, 1942, the time fixed for filing acceptances of the plan; the further date of June 17, 1942, referred to by respondent, was the time fixed in the order of the court confirming the plan dated June 6, 1942 (No. 117), within which application for allowances might be made, the court expressly reserving jurisdiction in its order to make these allowances. Respondent filed his claim for such an allowance, and the following appears in his direct testimony in support of said claim:

> "Q. Was it your understanding that all of this work was done with a view to reorganize the Cosgrove-Meehan Coal Corporation?
>
> A. Very definitely. That was the only possible purpose." (No. 138 p. 55)

Reference to this fact is made here for the sole purpose of showing that there was no misunderstanding of the form or nature of respondent's claim in the District Court, as alleged by respondent in his brief. The record will show, despite the finding of the Circuit Court of Appeals, that he has never made a claim as a creditor in the District Court; and the opinion of the Circuit Court of Appeals as to the nature of his claim is clear error. However, that issue is not raised in the petition filed with this Court.

In conclusion, petitioners urge that their petition, confined solely to the jurisdictional question raised therein, should be granted.

Respectfully submitted,

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